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# The Secession Reference and the Limits of Law

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## The Secession Reference and the Limits of Law

Richard S. Kay\*

When the Supreme Court of Canada issued its judgement on the legality of "unilateral" Quebec secession in August 1998<sup>1</sup> many Canadians did not know what to make of it. The Court held that the only lawful way in which Quebec might depart the Canadian federation was through one of the amendment mechanisms provided in the Constitution Act 1982. It thus affirmed that Quebec could not secede without the agreement of at least the Houses of the federal Parliament and some number of provincial legislative assemblies. Prime Minister Chretien declared the next day that the judgement was a "victory for all Canadians."<sup>2</sup> The court also held, however, that upon a sufficient expression of popular sentiment for separation in Quebec the government of the province had a "right . . . to pursue secession."<sup>3</sup> In that case the federal government and other provinces were obliged to enter into honest negotiations to attempt to satisfy the desire for secession. Thus Premier Bouchard, on the same day, confidently announced that the Court had "shake[n] the very foundations of federalist strategy."<sup>4</sup> No wonder one of the of the most common adjectives applied to the decision was "solomonic."<sup>5</sup>

My purpose in this paper is to consider the best way to characterize what the Supreme Court did in the *Secession Reference*. The immediate importance of the Court's judgement has perhaps receded as the intensity of separatist sentiment in Quebec has diminished. But, in a country whose underlying constitutional premises continue to be unsettled, it remains a critical artifact in any attempt to forecast the constitutional future. More generally, it illustrates an unusual but not unique phenomenon — the intervention of courts of law in the resolution of disputes concerning the very presuppositions of the legal and political system of which they form a part.

The Supreme Court's intervention capped a particularly dramatic phase in the apparently endless controversy over the place of Quebec in the Canadian confederation. In October 1995, the Quebec electorate rejected, by the narrowest of margins, a referendum proposition that would have put in motion provincial actions leading to a radically different relationship with the rest of Canada or to outright independence. The strength of the separatist sentiment stirred the federal government to initiate a policy with two aspects. First, it proposed a set of conciliatory measures devolving more authority on the provincial government.

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<sup>1</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217. Subsequent references are to the Court's paragraph numbers.

<sup>2</sup> Toronto Star, August 22 1998 (available in LEXIS-NEXIS, News Library, Allnws File).

<sup>3</sup> Para. 88.

<sup>4</sup> Toronto Star, August 22 1998 (available in LEXIS-NEXIS, News Library, Allnws File).

<sup>5</sup> See Irwin Cotler, "Most Important Case Ever," Canadian Jewish News, August 27, 1998, pp. 1, 36 (available in LEXIS-NEXIS, News Library, Allnws File).

At the same time, however, it implemented what came to be called "Plan B". The point of this strategy was to make clear that secession for Quebec could not be achieved painlessly. The federal government might, for example, set its own criteria for an expression of popular will sufficient to legitimize separation. And even if sovereignty were agreed to principle, it might require financial arrangements and territorial adjustments that would create difficulties for the latent Quebec state. It was as part of this approach that the federal government decided to seek an authoritative legal judgement affirming that Quebec had no right to depart on its own terms.<sup>6</sup>

In September 1996, the federal government posed three questions to the Supreme Court under the reference jurisdiction created by the Supreme Court Act.<sup>7</sup> These questions asked 1) whether Quebec could "under the Constitution of Canada" secede "unilaterally"; 2) whether it had a right to do so under international law; and 3) if there were a conflict between domestic and international law, which would prevail.<sup>8</sup> My focus here will be on the first question. The Court, in response to the second question, held there was no right of secession at international law, at least for people in the circumstances of the inhabitants of Quebec. (It conceded, however, that a secession might end up being "accorded legal status by Canada and other states" even if the separation itself was not "achieved under colour of a legal right".<sup>9</sup>) As to the third question, the Court concluded that there was no conflict between Canadian and international law and, therefore, no answer was necessary.

The Court's response to the first question, about the right of secession "under the Constitution of Canada," was not exactly straightforward. It did not canvass the arguably controlling rules of constitutional law and infer an answer from their contents. Instead, after disposing of some preliminary jurisdictional questions, it set out a horseback history of constitutional developments in Canada. It then identified and elaborated four "underlying principles" of the Constitution. Such principles, the Court declared, "inform and sustain the constitutional text; they are the vital unstated assumptions upon which the text is based". Besides serving as aids to interpretation the Court stated that these principles:

may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference* . . . ) which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.<sup>10</sup>

<sup>6</sup> See generally CANADA WATCH, (August, 1996) (Special Double Issue: Focus on Plan B).

<sup>7</sup> R.S.C. 1985, c. S-26, s. 53.

<sup>8</sup> Para. 2.

<sup>9</sup> Para. 144.

<sup>10</sup> Para. 54 citing *Reference re Resolution to Amend the Constitution*, [1981] S.C.R. 753 at 845. It should be noted that the "we" referred to in the Court's quotation is the separate judgement of Justices Martland and Ritchie dissenting from the majority judgment that there was no legal impediment to the houses of the federal

Over the next 27 paragraphs the Court elucidated four such principles: federalism, democracy, constitutionalism and the rule of law, and respect for minorities, warning that this list was “by no means exhaustive”.<sup>11</sup> Only then did the Court turn to the amendment provisions of the written constitution, noting that a Quebec referendum, “in itself and without more, has no legal effect, and could not in itself bring about unilateral secession”.<sup>12</sup> As a consequence of the “federalism” and “democratic” principles, however, a referendum result that evidenced “a clear expression by the people of Quebec of their will to secede” would trigger “a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire”. This duty to negotiate was explicitly stated to be part of the “law of the Constitution”, and of “binding status”. And, the Court proclaimed, “[w]here there are legal rights there are remedies”.<sup>13</sup>

Notwithstanding its clear statement that the duty to negotiate was binding at law, the Court stated emphatically that the courts would entertain no complaints based on this duty. It briefly discussed such questions as when the duty arose (“a clear majority on a clear question in favor of secession”) and what issues might properly be addressed (e.g., the national debt and boundaries).<sup>14</sup> These obligations, although “part of the law of the Constitution”, were “non-justiciable”. The reason for this conclusion was “the Court’s appreciation of its proper role in the constitutional scheme”.<sup>15</sup> The implementation of the constitutional operations it had described required “political judgements and evaluations” and since “the methods appropriate for the search for truth in a court of law are ill-suited” to such a task, the court would exercise “no supervisory role”.<sup>16</sup> Every legal right

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Parliament requesting the Queen to place before the United Kingdom Parliament the necessary legislation to effect the constitutional reforms of 1980-1982. Martland and Ritchie JJ. made this assertion after citing four cases of the Supreme Court in which either the Court or some justices of the Court had held legislation unconstitutional without relying on specific textual provisions. Two cases dealt with limitations on remedies for other unconstitutional actions. One involved an impermissible province to federal government delegation of power and the last affirmed that a provincial statute could, not abridge the right of public discussion, given that freedom of speech did not fall under a head of provincial jurisdiction. *Id.* at 841-44. The dicta of Justices Martland and Ritchie was adopted by the Court in support of its limited remedial order in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 751.

<sup>11</sup> Para. 32.

<sup>12</sup> Para. 87.

<sup>13</sup> Paras. 98, 102.

See Patrick J. Monahan, *Public Policy Role of the Supreme Court of Canada in the Secession Reference*, 10 NAT. J. CONST. L. 65, 84 (1999-2000). As the text indicates, I interpret the judgement as expressing a “legal” duty to negotiate. It is possible to read this duty as neither legal nor conventional but some third kind of constitutional obligation. See Warren J. Newman, *THE QUEBEC SECESSION REFERENCE: THE RULE OF LAW AND THE POSITION OF THE ATTORNEY GENERAL OF CANADA*. 55-57, 72-73 (1999). Given the non-justiciability of the duty and its consequent practical equivalence with convention duties, the exact label is not a critical matter for me.

<sup>14</sup> Para. 100.

<sup>15</sup> Para. 98.

<sup>16</sup> Paras. 100-101. It might be noted that there would have been nothing intrinsically foreign to judicial practice in judicial oversight of a duty to negotiate. The duty to

has a remedy but in this case "the appropriate recourse . . . lies through the workings of the political process rather than the courts".<sup>17</sup>

The Court, therefore, went well beyond a simple reply to the first question posed to it. It was explicit that "under the Constitution of Canada" Quebec could not secede "unilaterally". But it went on to lay out the road map for a multilateral process that might, consistently with the Constitution, lead to the departure of Quebec. Perhaps this is why, in a striking departure from past practice, the Court declined to close its judgement with Yes or No answers to the questions asked by the government. Instead, it merely concluded that "[t]he reference questions are answered accordingly".<sup>18</sup> More than one commentator has found this result anomalous. Canadian governments are under a binding duty to act after an affirmative referendum result. But the exact contours of those duties are not subject to legal resolution and the breach of those duties is not subject to legal redress. Such matters are left entirely to the unsupervised decisions of political actors. Michael Mandel expressed the point vividly:

To appreciate how really extraordinary this is, imagine if, at the end of a trial, the judge said, instead of "guilty" or "not guilty", that "*the guilty one is the one who clearly did it, but I leave it to the prosecutor and the accused to decide who that is. As for me, I'm outa here.*"<sup>19</sup>

This state of affairs, however, is not really that exceptional. It is a fundamental feature of the constitution of Canada (and of the United Kingdom, and of New Zealand, too) that many of the most critical norms of public behavior are not enforceable by legal action. These norms are the "conventions" of the constitution. Peter Hogg defines conventions as "rules of the constitution that are not enforced by the courts", "best regarded as non-legal rules". Though without legal sanction, "conventions are, in fact, nearly always obeyed by the officials whose conduct they regulate".<sup>20</sup> The central place of conventions in the operation of parliamentary government cannot be overstated. Responsible government, itself, depends on conventions requiring the Queen or Governor-General to choose ministers that have the confidence of Parliament and to act only on the advice of

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bargain in good faith has been the object of adjudication for decades. See, e.g., H.W. ARTHURS, D. CARTERS, e.a., *LABOUR LAW IN INDUSTRIAL RELATIONS IN CANADA*, 259 (4<sup>th</sup> ed. 1992). In the context of the Canadian Constitution the duty framed in the *Secession Reference* is only the latest in a series of such duties developed in recent years. See Dwight Newman, *Reconstituting Promises to Negotiate in Canadian Constitution-Making*, 10 NAT. J. CONST. L 1 (1999).

<sup>17</sup> Para. 102.

<sup>18</sup> Para. 156. See Mary Dawson, *Reflections on the Opinion of the Supreme Court in the Quebec Secession Reference*, 11 NAT. J. CONST. L 5, 7 (1999-2000).

<sup>19</sup> See Michael, Mandel, *Solomonic or Mulronic*, 7 CANADA WATCH 86 (1999); See also Monahan, *supra* note 13 at 84; Peter Hogg, *The Duty to Negotiate*, 7 CANADA WATCH 1,3 (1999); Robin Elliott, *References, Structural Argumentation and the Organizing Principles of Canada's Constitution*, 8 CAN. B. REV. 67, 94-95 (2001).

<sup>20</sup> PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 17-18 (1998 student ed.) Dicey said conventions "are not in reality laws at all since they are not enforced by the Courts." A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* cxli (8<sup>th</sup> ed. 1915) (1982 reprint).

those ministers. Eugene Forsey accurately described the role of conventions when he called the strict law of the Constitution the skeleton of the body politic and conventions its sinews and nerves.<sup>21</sup>

The duty to negotiate declared in the *Secession Reference* is very hard to distinguish from a convention. Like a convention it is a binding norm of constitutional conduct. And like a convention its "breach is a matter for the political process and public opinion, not the legal process and the courts".<sup>22</sup> While the courts have never enforced conventions they have, on rare occasions, defined and articulated them.<sup>23</sup> Indeed the outcome of the *Secession Reference* bears a remarkable parallel to the Supreme Court's most prominent previous intervention in the constituent debate, the judgment in the *Patriation Reference*<sup>24</sup> in 1981. In that case the Court heard appeals from three provincial Courts of Appeals whose governments had submitted reference questions concerning the federal government's plan to seek amendment of the Constitution by the Westminster Parliament without the agreement of provincial governments. All three provincial references had explicitly inquired as to the presence of either a law or a convention that might authorize or prohibit such an action. The majority of the justices held there was no law preventing this course of action but that it would be contrary to a constitutional convention.

In the *Patriation Reference* the Court affirmed the strict legal power of the federal government to act unilaterally to affect major changes in the constitution. But it held a non-justiciable constitutional norm — the convention of provincial agreement — obliged it to negotiate that result with other units in the federation if it wanted to use that legal power. In the *Secession Reference* the Court denied, as matter of strict law, that Quebec had the power to effect unilateral constitutional change. But again it held that a non-justiciable constitutional obligation enjoined the other units in the federation to negotiate the changes that Quebec demanded. In each case, that is, the legal state of affairs was significantly modified by an unenforceable political requirement. In each case, the latter requirement effectively promoted a political negotiation.

Notwithstanding this strong similarity, the terminology employed in the two references is distinctly different. Given the definition of convention and its employment in the *Patriation Reference* one would expect that the same device would have been exploited in the *Secession Reference*. But it appears that the Supreme Court quite deliberately avoided that course in 1998. There, too, the Court made two references to conventions in its judgement. In introducing the idea of "underlying principles" it said these "include constitutional conventions", but then went on to describe its four principles without using that terminology. Even more pointedly, in defending its decision that judicial recourse was inappropriate to resolve claims of breach of the duty to negotiate, it referred to

<sup>21</sup> Eugene Forsey, *The Courts and the Conventions of the Constitution*, 33 U. N. B. L. J. 11, 12 (1983).

<sup>22</sup> Warren J. Newman, "Grand Entrance Hall", *Backdoor or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada*, ((2001) 14 Sup. Ct. L. Rev. (2d. ser.) 197, 200-01.

<sup>23</sup> Reference re Resolution to Amend the Constitution, [1981] S.C.R. 753; Reference re Objection by Quebec to Resolution to Amend the Constitution, [1982] S.C.R. 793.

conventions as constitutional rules that carry "only political sanctions". "It is also the case, however," the court went on to say, "that judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme."<sup>25</sup>

In the *Patriation Reference*, of course, the Court was explicitly asked about the constraints of convention.<sup>26</sup> That was to be expected. The three references on appeal were instituted by three of the provincial governments (the "gang of eight") opposing the federal government's threatened unilateral action. The legal case for restraining unilateral patriation was judged to be weak (as was ultimately confirmed by the Supreme Court's 7-2 decision on the point). The decision on the part of the "gang of eight" to proceed by reference instead of legal action was dictated in part by the former's better ability to test the convention question.<sup>27</sup> The *Secession Reference*, on the other hand, was initiated by the federal government. Its strong suit was once again the law. It had no interest in learning if the Court thought there were conventional norms on the subject of secession. Still the text of the question was broad enough to include a discussion of conventions as well as law. The power of Quebec was to be assessed "under the Constitution of Canada".<sup>28</sup> Under common usage that included both the law of the constitution and its conventions.<sup>29</sup>

Indeed, the possibility that constitutional conventions might be important in understanding the extent of constitutional authority related to secession had already been prominently mooted in the secession debate. Daniel Turp argued that the behaviour and conduct of officials during and after the 1980 referendum amounted to a recognition that a successful referendum would oblige the rest of Canada to accede to Quebec's sovereignty. It demonstrated, that is, the existence of a convention that "would entail the obligation [of the federal and other provincial parliaments] of making the constitutional amendments necessary to give [secession] effect and thereby allow Quebec to withdraw from Confederation".<sup>30</sup> The Court, itself, at the hearing on the reference, inquired

<sup>24</sup> Reference re Resolution to Amend the Constitution, [1981] S.C.R. 753.

<sup>25</sup> Paras. 32, 98. See NEWMAN, *supra* note 13 at 43.

<sup>26</sup> Reference re Resolution to Amend the Constitution, [1981] S.C.R. 753, 762.

<sup>27</sup> R. ROMANOW, J. WHYTE, & H. LEESON, "CANADA... NOTWITHSTANDING: THE MAKING OF THE CONSTITUTION 1976-1982, 160-63 (1984). The federal government had, in fact, justified its own refusal to resolve the provincial objections by reference to its conviction that the whole amendment process was governed by convention, something it maintained was not appropriate for judicial resolution. See P. Russell, *Bold Statecraft, Questionable Jurisprudence in AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT* (K. Banting & R. Simeon, eds. 1983).

<sup>28</sup> Para. 2.

<sup>29</sup> Reference re Resolution to Amend the Constitution, [1981] S.C.R. 753, 883-84 ("The foregoing may be summarized in an equation: conventions plus constitutional law equal the total constitution of the country.") But see Mark D. Walters, *Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and Its Lessons for the United Kingdom*, 62 MOD. L. REV. 371, 383 (1999) (Conventions "may form part of the Constitution in a broad sense, but they cannot be part of the "Constitution of Canada" that forms the "supreme law" that prevails over conflicting law...")

<sup>30</sup> Daniel Turp, *Quebec's Democratic Right to Self-Determination: A Critical and Legal Reflection* in TANGLED WEB: LEGAL ASPECTS OF DE-CONFEDERATION 99, 103-107 (S. Hart



about the possibility of a relevant convention, a point on which the parties responded in later written submissions.<sup>31</sup>

The Court must have considered, however, in light of its own earlier pronouncements on the criteria for recognizing constitutional conventions, that it did not have the option of declaring a convention requiring negotiation in case of a favourable referendum result. In the *Patriation Reference* the Court had adopted the criteria for finding a convention developed by the British commentator W. Ivor Jennings:

We have to ask ourselves three questions: first what are the precedents; secondly did the actors in the precedents believe they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.<sup>32</sup>

The Court applied these requirements in finding a convention necessitating “substantial” provincial assent to the patriation amendments. The following year, after the Constitution Act, 1982 had been approved and was waiting to be proclaimed in force, Quebec initiated a reference claiming that the provincial assent convention had to be understood as requiring Quebec’s approval as part of such substantial agreement. It was able to cite an impressive list of precedents supported by the historical acceptance of “duality” as a Canadian constitutional principle. The Supreme Court, faced with the prospect of declaring illegitimate the constitutional arrangements now in place, applied the Jennings criteria with a special rigor. With respect to the requirement that the actors involved believed they were bound, the Court insisted on proof of explicit statements acknowledging a Quebec veto over constitutional amendments by both federal and provincial officials.<sup>33</sup> There might well be reasons (of the kind discussed by the Court in the *Secession Reference*) for a convention obliging federal and provincial authorities to negotiate secession on an affirmative referendum vote. But there certainly were no precedents for such behaviour and no statements by officials acknowledging such an obligation. Unless it were to repudiate the precedent of the *Quebec Veto Reference*, a convention requiring negotiation did not seem possible.<sup>34</sup>

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e.a. eds., 1992). A response to Turp’s argument was given in Jeremy Webber, *The Legality of Unilateral Declaration of Independence Under Canadian Law*, 42 MCGILL L.J. 281, 303-04 (1997). See also Fabien Gelin, *Les conventions, le droit et la constitution de Canada dans le renvoi sur la ‘secession’ du Québec: le fantôme du rapatriement*, 57 REVUE DU BARREAU (QUEBEC) 291 (1997) (arguing the existence of a convention permitting Quebec secession and the possibility of such a convention “crystallizing” into enforceable law).

<sup>31</sup> See e.g. Written Response of the Attorney-General of Canada to Questions from the Supreme Court of Canada, <http://canada.justice.gc.ca/en/ps/const/replyqa5.html>.

<sup>32</sup> Reference re Resolution to Amend the Constitution, [1981] S.C.R. 753, 888.

<sup>33</sup> Reference re Objection by Quebec to Resolution to Amend the Constitution, [1982] S.C.R. 793, 814-17.

<sup>34</sup> The Court was possibly reminded of these requirements by the Attorney-General

Nevertheless, the Court's construction of a non-textual and non-justiciable "constitutional duty" is identical in effect to the declaration of a convention. Both devices, moreover, highlight the very anomalous role that the Court has carved out for itself in the debate on the place of Quebec in Canada. That debate is not amenable to *legal* resolution that will be recognized as such by the contending parties. Canadian law — including its constitutional law — presupposes a legitimate Canadian polity. But, in this case, the legitimacy of that polity is itself in contest. That is, citations to the supremacy of law make no sense when, as in this case, the very authority of the law has been put into issue.<sup>35</sup>

This point is central and bears some amplification. The application of positive law to any dispute presupposes that the parties to the dispute are already bound to the observation of that law. Imagine two homeowners, L and R, on adjoining properties. R proposes to erect a structure. L claims it will encroach on his property and, in support, produces a deed setting forth the boundary. If R responds that L has misunderstood the deed, the dispute may be settled based on some authoritative interpretation of that document, say one issued by a court of law whose jurisdiction both parties recognize. If, however, R says the deed is a forgery, or that it was induced by fraud, or that the law giving effect to deeds is invalid, he will surely not be satisfied by arguments based on the deed's language. Of course, in this hypothetical case, R's claims might be dealt with by a decision premised on other controlling law — the law concerning the effectiveness of deeds or the constitution of the state. But when R denies the authority of the whole legal system, there are no anterior norms that can resolve the dispute. This does not mean a legal system cannot be effective unless every person whose conduct it purports to govern subjectively accepts it. But the force of that system over such dissidents will rest, ultimately, not on shared attitudes towards the authority of law but on the ability to coerce.<sup>36</sup>

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of Canada's written response to its questions about a convention (probably understood, at the time, to refer to a convention recognizing secession as discussed above). Written Response of the Attorney-General of Canada to Questions from the Supreme Court of Canada, <http://canada.justice.gc.ca/en/ps/const/replyqa5.html>. See also Newman, *supra* note 22 at 3-4.

<sup>35</sup> On the irrelevance of law to fundamental constituent questions see Richard Kay, *Courts as Constitution-Makers in Canada and the United States*, 4 SUP. CT. L. REV. 23 (1982).

<sup>36</sup> I do not wish to engage here the question of whether or not every new independent legal system must logically be characterized as resting on a non-legal basis. In the context of the independence of former British colonies this has been said to turn on whether the sovereignty of the Westminster Parliament is "continuing" (so that no parliament may bind its successors) or "self-embracing" (so that a future parliament may be so bound.) See H.L.A. HART, *THE CONCEPT OF LAW* 149-52 (2d. ed. 1994); Peter Oliver, *The 1982 Patriation of the Canadian Constitution: Reflections on Continuity and Change*, 28 THEMIS, 876 (1994). With respect to the possibility of a secession of Quebec in accordance with Canadian law this turns on the capacity of such an action to be accomplished by the amending procedures or the Constitution Act, 1982. See para. 84 (secession possible by amendment). But see Jacques Fremont & Francois Boudreault, *Supraconstitutionalite canadienne et secession du Quebec*, 8 NAT. J. CONST. L. 163 (1997) (contra). Whatever the ultimate characterization of a successful secession by historians and legal theorists, however, most advocates of a future secession will not, for reasons discussed, regard the

This proposition may explain the apparent bewilderment of Quebec separatist leaders in response to the idea that the Supreme Court, a creature of (not to say appointees of), the very entity they wished to reject, could have something useful to say about the secession question.<sup>37</sup> The secessionist project is premised on the proposition that the institutional machinery constituting the Canadian state and legal system lack the political legitimacy necessary to command obedience from an unwilling Quebec. This attitude also underlay the Quebec government's refusal to participate in the argument of the reference. The *amicus curiae*, arguing the case for a Quebec secession power, also challenged the jurisdiction of the court, claiming that the issues involved in the reference concerned "the origin and existence of the state". As such they were "purely political" and inappropriate for judicial decision.<sup>38</sup> Even in his claim that an effective unilateral secession had to be recognized in Canadian law the *amicus* highlighted the pre-legal (or as the *amicus* put it, the "meta-constitutional" or "hyper-constitutional"<sup>39</sup>) character of the questions posed to the Court. In an extraordinary reference he noted that all English law (and derivatively all Canadian law) could trace its legal pedigree no further back than the Glorious Revolution of 1688-1689, which, itself, was an act inconsistent with existing constitutional norms:

La Constitution britannique a été modifiée profondément dans des circonstances exceptionnelles: où la légitimité politique était incompatible avec la Constitution formelle. Le nouvel ordre constitutionnel issu des événements politiques de 1688 est validé juridiquement par la règle selon laquelle un changement politique fondamental et effectif entraîne par lui même un changement constitutionnel.<sup>40</sup>

He went on to cite Blackstone's *Commentaries* in which the great eighteenth century authority on English law conceded the impossibility of reconciling the revolution with English law:

In these, therefore, or other circumstances which a fertile imagination may furnish since both law and history are silent, it behooves us to be silent too, leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent though latent powers of society which no climate, no time, no constitution, no contract, can ever destroy or diminish.<sup>41</sup>

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strictures of Canadian law as relevant to the justness of their position.

<sup>37</sup> See e.g. *Portland Press Herald*, Feb. 18, 1998, 8A (Quoting Lucien Bouchard: "Ottawa is asking judges it appoints unilaterally to rule on a constitution it imposed unilaterally so it can unilaterally oppose democracy.")

<sup>38</sup> *Mémoire de l'amicus curiae*, December 18, 1997, para. 41 (Ces questions touchent directement à l'origine et à l'existence d'un État. Il s'agit de questions purement politiques, exclues de la juridiction des tribunaux. La Cour devrait refuser de répondre.)

<sup>39</sup> *Id.* at para. 135 citing H. HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 674 (1847). On the invulnerability of pre-legal norms to ordinary legal change see Jacques Frémont & François Boudreault, *supra* note 35 at 163 (1997); See generally Richard S. Kay, *Pre-Constitutional Rules*, 42 OHIO. S. L.J. 187 (1981).

<sup>40</sup> *Id.* at para. 127.

<sup>41</sup> *Id.* at para. 128 quoting W. BLACKSTONE, *BLACKSTONES COMMENTARIES: THE CONSTITUTION AND LAWS* 245 (1803 American ed.)

These arguments were put forward to convince the Court to answer the reference question so as to allow the possibility of a successful unilateral secession under Canadian law. But they are more powerful authority for the proposition that such events are simply not susceptible to legal — and therefore judicial — analysis or control.

The Supreme Court's response to this argument was to confine its inquiry to the legality of the secession *at the moment of its occurrence*. In its discussion of international law the Court acknowledged that a successful secession of Quebec could give rise to a new legal reality without regard to its consistency with Canadian law. "No one doubts", it conceded "that legal consequences may flow from political facts and that 'sovereignty is a political fact for which no purely legal authority can be constituted . . .'". The latter quotation, from one of the best known modern articles analyzing the essentially non-legal basis of every system of law, had been cited by the *amicus curiae*.<sup>42</sup> In both the international law and Canadian law holdings the Court correctly noted that a revolution's subsequent achievement of legality did not operate retroactively so as mean that it was lawful *ab initio*.<sup>43</sup> That is, the Court took its charge to be an evaluation of the legality of secession *within the existing Canadian legal system*. The reference procedure, the federal and provincial governments and Parliaments and the Court itself are all creatures of Canadian law. These institutions can hardly be expected to approach the subject from what H.L.A. Hart called the "external" viewpoint — that of a person feeling no obligation toward the system of law involved.<sup>44</sup> From the "internal" point of view the Court's holding that there was no unilateral right of secession was entirely predictable, indeed inevitable.

This understanding of the Court's attitude still needs to be reconciled with its declaration of fundamental principles and the duty to negotiate. As the Court formulated them, these norms are not designed to operate only within a single ongoing and uninterrupted Canadian legal system. They are, rather, explicitly applicable also to the process whereby that system may come to an end and a new system or systems will emerge.<sup>45</sup> The Court based its determination to leave the execution of these constitutional duties entirely to the political process on the ground that the standards enunciated could only be measured against "political judgements and evaluations . . . [about which] [o]nly the political actors have the [necessary] information and expertise...".<sup>46</sup> But courts have long supervised complicated negotiations in other contexts, such as collective

<sup>42</sup> Para. 142 quoting H.W.R. Wade, *The Basis of Legal Sovereignty*, [1955] CAMB. L.J. 172, 196. The quotation is found in the *factum* of the *amicus curiae*, *Memoire de l'amicus curiae*, December 18, 1997 at para. 116.

<sup>43</sup> Paras. 107, 146.

<sup>44</sup> H.L.A. HART *supra* note 36 at 88-91, 116-20 (2d. ed. 1994). Mark Walters employs Hart's terminology, if not his underlying approach, in his analysis of the *Secession Reference*. See Walters, *supra* note 29. Walter's argues that unwritten principles capable of limiting even express constitutional rules may properly be understood as part and parcel of the pre-existing legal system. See Mark D. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law*, 51 U. TOR. L. J. 91 (2001).

<sup>45</sup> See Graeme G. Mitchell, *Developments in Constitutional law: 1998-99 Term — Statecraft and Status Quo*, 11 SUP. CT. L. REV. (2d. Ser.) 101, 125-26 (2000).

<sup>46</sup> Para. 100.

bargaining, with reasonable success.<sup>47</sup> The real inability of courts in this context stems not from their limited fact-finding and judging abilities but from the reality that, in the context of fundamental constituent decisions, they lack the first thing a court needs to deal with any controversy — a rule of law.

How, then, will this judgement affect future decisions about the place of Quebec in confederation? As with its holdings on unenforceable constitutional conventions governing the process of constitutional amendment, the judgement “could have political consequences but no legal ones”.<sup>48</sup> Notwithstanding its assertions that the duty to negotiate was rooted in binding law, the Court’s statements amount only to a plea for a certain kind of behaviour by the political actors after a potential yes vote in the next Quebec referendum. This was the point made by Greg Craven shortly after the decision:

[T]he Canadian Supreme Court’s demands for considered negotiation undoubtedly are not intended to operate primarily as some fully binding legal pronouncement. Rather, they are cast so as to stigmatize those who would seek to resolve Canada’s dilemma without such bilateral accommodation as constitutional outlaws, acting outside conventional modes of constitutional morality.

What the Court is apparently attempting to do is to force political and other players to the negotiating table by effectively pronouncing a rule of constitutional morality in favour of negotiation. True, there are appropriately broad references to this or that provision of the Constitution of Canada, but in essence this is a judgment of political morality, not law. . . .<sup>49</sup>

Another commentator, much more enthusiastic about the judgement, supports the idea that there was something less “legal” in the *Secession Reference*. James McHugh noted that the Court eschewed its usual technical legal language (contrasting it in particular to the reasons for judgement in the *Patriation Reference*) in favour of rhetoric more “politically and philosophically expressive”.<sup>50</sup> Similarly, John Whyte observed that the Court saw its job as one of “putting in place certain moral demarcations” in the hopes that “the protagonists believe that legitimacy matters”.<sup>51</sup> The Court defended its determination to deal only in “identification of the relevant aspects of the Constitution in their broadest sense” and to renounce any future judicial roles as a proper abstention from purely political controversy.<sup>52</sup> Paradoxically, that very approach meant that the Court’s participation in the constituent debate (insofar as the duty to negotiate

<sup>47</sup> See H. ARTHURS, D. CARTERS, E.A. *supra* note 16 at 259.

<sup>48</sup> Reference re Objection by Quebec to Resolution to Amend the Constitution, [1982] S.C.R. 793, 799.

<sup>49</sup> Greg Craven, *The Quebec Secession Reference: The Law of Politics or the Politics of Law?* 6 MURDOCH U. ELEC. J. OF LAW paras. 10,12.

<sup>50</sup> James T. McHugh, *Making Public Law, “Public”: An Analysis of the Quebec Reference Case and Its Significance for Comparative Constitutional Analysis*, 49 INT’L. & COMP L. Q. 445, 454 (2000).

<sup>51</sup> John D. Whyte, *The Secession Reference and Constitutional Paradox in THE QUEBEC DECISION: PERSPECTIVES ON THE SUPREME COURT RULING ON SECESSION* 130, 133 (D. Schneideman, ed. 1999).

<sup>52</sup> Paras. 98-101.

is concerned) was *solely* political.<sup>53</sup> Its judgement could have no effect other than its influence on the political behaviour of the non-judicial politicians.

One might have expected the Court's declaration of principles to be most immediately employed in further constitutional litigation. As Warren Newman observed, "[i]t did not take the proverbial rocket scientist (or to modernize the simile; a web page designer) to realize that a whole new vista of legal argument had just opened up". To prove the point he cited a number of instances where constitutional principles had been raised "within days" of the release of the judgement in the *Secession Reference*.<sup>54</sup> It seems that lower courts have been distinctly uncomfortable dealing with such insubstantial notions.<sup>55</sup> In one of the first cases in which the Supreme Court's principles were entertained by a provincial appellate court, the Court of Appeals of Alberta refused the request of a popularly selected Senate candidate that it issue a declaration that the appointment of any person who had not been endorsed in such a vote was "contrary to democratic principles". The court recoiled from such an action:

Non-legal matters of, among other things, morality and politics are not within the court's jurisdiction. . . . [The appellant] wants the court to look at the appointment process and to make a statement on whether or not the process is democratic. . . . We agree with the Crown that "the appellant "seeks to invoke the democratic principle per se, divorced of its interpretive role, and devoid of legal issues simply because a declaration from the court would, in his view, "have considerable persuasive effect, and it would confer democratic legitimacy on the Senatorial Selection Act".<sup>56</sup>

The actual holding in the *Secession Reference*, however, seems to do exactly what the Alberta court said a court should not do — use a broad constitutional principle solely for its persuasive effect in order to confer legitimacy on one kind of political process. In general, courts that have been presented with arguments based on "constitutional principles" have treated them respectfully but it is hard to pinpoint many cases where they have been taken so seriously as to change a result.<sup>57</sup>

<sup>53</sup> It is worth noting that the duty to negotiate might be inferred (less controversially) from the constitution's statement that any legislative assembly may initiate the procedure for constitutional amendment. CONSTITUTION ACT, 1982, s. 46. The Court referred to this "right" to propose amendments as implying a reciprocal duty on other actors to engage in constitutional discussion on the proposal. Para. 69. See NEWMAN, *supra* note 13 at 46. Given the judgment, as a whole, however, it is unlikely the presence of this text was an essential element in the decision.

<sup>54</sup> Newman, *supra* note 22 at 198-99; Monahan, *supra* note 12 at 91. See cases cited in Newman, *supra* at notes 2-7.

<sup>55</sup> "Woe to the lawyer who has only a "notion" to assert." *Id.* at note 106 citing cases.

<sup>56</sup> Brown v. Alberta, (1999) 177 D.L.R. 183, paras. 12, 24-25.

<sup>57</sup> See cases cited in Newman, *supra* note 13 at notes 2-7; Jean Leclair, *Canada's Unfathomable Unwritten Principles*, (2002) 27 QUEEN'S L.J. 389, 414-17. In *Lalonde v Commission de restructuration des service de sante* [2001] O.J. No. 4767 the Ontario Court of Appeal held that the direction of the Commission reducing services at the province's only hospital providing all services in French was invalid. The court interpreted the Commission's statutory authority to require greater

Notwithstanding its failure to affect litigation on other matters, and its explicitly non-justiciable character, the *Reference* may well make a difference in the way the Quebec question unfolds in the future. One much noted development was a direct consequence of the *Reference*. That is Bill C-20, the federal "Clarity Bill", which received the royal assent in June 2000.<sup>58</sup> This Act called for the federal House of Commons to review the clarity of any proposed secession question and of the result of any referendum. It forbids the federal government from entering into negotiations as a result of any process not satisfying this scrutiny. This bill, which predictably infuriated the Quebec government,<sup>59</sup> was entitled "An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference." Its preamble provides a series of "whereas" clauses each referring to aspects of the Supreme Court's judgement. The bill was defended by citation to and quotations from the *Reference*.<sup>60</sup> The Quebec Minister of Intergovernmental Affairs called it "a crude rewriting of the Supreme Court's opinion".<sup>61</sup>

On its face, the Clarity Act speaks only to the response of the federal government when the next referendum is proposed. Like all political action concerning Quebec, however, it will also affect the sentiments of the Quebec electorate and that, in turn, may help determine whether there is a referendum and, if there is, how it will turn out. The Supreme Court's unenforceable dicta may influence the course of the sovereignty movement in other ways as well. For example, Premier Bouchard attempted to drum up pro-sovereignty sentiment by quickly declaring that the *Reference* result dispelled the federal intimations of chaos following a "yes" vote by dictating an orderly process of negotiation.<sup>62</sup>

The opinion, if followed, could also alter the post-referendum negotiations themselves. First, of course, it would go far towards ensuring that, after a proper result, prompt negotiations do, in fact, take place. While that was likely in any event,<sup>63</sup> the federal government may have attempted, at least in the first instance, to employ other options to test the seriousness of the Quebec position. The Court's insistence that the negotiations proceed in accordance with the four "organising principles" especially as they were elaborated in the judgment may alter the parties' relative bargaining positions. Thus the Court set out an agenda of topics that negotiations would have to resolve, mentioning particularly the national

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attention to the constitutional "fundamental principle" of the protection of minorities recognized in the *Secession Reference*.

<sup>58</sup> 48-49 Eliz. II, c. 26.

<sup>59</sup> The government of Quebec responded with its own Bill 99, "An Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec state," declaring, almost in terms, the independence of Quebec. Bill 99. An Act respecting the exercise of the fundamental right and prerogative of the Quebec people and the Quebec state. Leg. Que., 1999.

<sup>60</sup> See, e.g. Stéphane Dion, *Who's Afraid of Clarity*, Brief Submitted to the Legislative Committee on Bill-C-20, (Feb. 16, 2000) available at <http://www.pco-bcp.gc.ca>.

<sup>61</sup> M. Joseph Facal, *The Dark Side of Bill C-20 or What the Federal Leaders Are Not Telling You*, Speech delivered to the Press Club of Ottawa (May 2 2000) available at <http://www.cex.gouv.qc.ca/saic>.

<sup>62</sup> Premier Lucien Bouchard *Reflects on the Ruling* in THE QUEBEC DECISION: PERSPECTIVES ON THE SUPREME COURT RULING ON SECESSION 95, 97 (D. Schneiderman, ed. 1999).

<sup>63</sup> Peter Hogg, *supra* note 19 at 3.

debt and the rights of minorities.<sup>64</sup> Its statement that the Canadian national existence could not "be effortlessly separated along what are now the provincial boundaries of Quebec"<sup>65</sup> is an almost explicit insistence that the boundaries of an independent Quebec be settled in the negotiations. Since separatist leaders have vigorously proclaimed this issue as non-negotiable, the Court's intervention may powerfully strengthen the federalist side in post-referendum talks.<sup>66</sup>

All of these effects presume that the future conduct of the public officials will conform to this aspect of the Court's opinion, even though no judicial recourse will be available to oversee and correct any deviations. Most observers agree that the judgement will turn out to be a central point of reference in future decisions.<sup>67</sup> There is a convincing precedent in the aftermath of the *Patriation Reference* where the Court also expounded (in the form of a constitutional convention) judicially unenforceable standards for the proper making and unmaking of a Canadian constitution. The judgement of the Supreme Court in that case was released on September 28, 1981. In it the Court affirmed the strict legality of the federal government's proposal to seek amendments of the constitution from Westminster while, at the same time, taking note of a constitutional convention that barred such action without a "substantial degree" of provincial assent. The provincial opponents of unilateral patriation emphasized the convention holding. Rene Levesque announced that "the federal government [had] lost its moral authority to act without provincial consent".<sup>68</sup>

The federal government, at first, discounted the importance of the convention and declared victory based on the court's interpretation of the law. The day after the judgment Prime Minister Trudeau said he was prepared to do what the Supreme Court "clearly and massively indicated we have the legal authority to do . . . . I see no alternative but to press on".<sup>69</sup> The Minister of Justice, Jean Chretien, spoke directly to the relevance of the convention. He insisted it had "nothing to do with law". "Convention is in the political arena", he said. "When you go in front of the court you go for legality."<sup>70</sup>

<sup>64</sup> Para. 69.

<sup>65</sup> *Id.*

<sup>66</sup> See Quebec and its Territory, <http://www.cex.gouv.qc.ca/saic/territoire-a.html> (statement of Government of Quebec, 1997). See Monahan, *supra* note 13 at 97.

<sup>67</sup> See Peter Oliver, *Canada, Quebec and Constitutional Amendment*, 49 U. TOR. L. J. 519 606-07 (1999) ("There is no doubt that the Court's analysis will affect the dynamics of Canada-Quebec relations whatever the *Secession Reference* says about the courts keeping out of the political process.) The Supreme Court may face another opportunity to intervene in these decisions as the result of litigation commenced in 2002 in the Quebec Superior court seeking a declaration of the unconstitutionality of Quebec's Bill 99, passed in the wake of the *Secession Reference* and the Clarity Act. In this legislation the National Assembly declared the legal right of Quebec to decide its own status. The federal government has intervened to argue against Quebec's claim that the issue is non-justiciable. See Paul Wells, *So Now It's Not About Secession*, NATIONAL POST, March 19, 2002 available in WESTLAW Allnews database.

<sup>68</sup> United Press International Dispatch, September 29, 1981 available in LEXIS-NEXIS, News library, Arcnws File.

<sup>69</sup> United Press International Dispatch, September 28, 1981 available in LEXIS-NEXIS, News library, Arcnws File.

<sup>70</sup> United Press International Dispatch, September 29, 1981 available in LEXIS-NEXIS,



But it soon became apparent that there was a widely held perception that, with or without strict legal licence, unilateral action by the federal government would be an unacceptable defiance of the Supreme Court. The provincial opponents again stressed the convention. Roy Romanow explained that to breach the convention "would be analogous to the Governor-General dissolving parliament on a whim and inviting Ed Broadbent to be Prime Minister".<sup>71</sup> "Haven't politicians the duty to obey the constitutional rules without being forced to do so by the courts", Levesque asked.<sup>72</sup> The press mainly agreed. The *Globe and Mail* said the federal government should not ignore the convention aspect of the judgment just because it had a legal right to do so. The *Vancouver Province* said the Court's discussion of the need for provincial agreement was "far more important than the issue of strict legality".<sup>73</sup>

Perhaps more significantly, Ed Broadbent, whose New Democratic party had supported the government's constitutional project in Parliament, insisted that a new conference of premiers be called to seek agreement as the price of his continued support: "You don't have a Supreme Court decision and ignore it."<sup>74</sup> And more ominously yet, there were signs that if the Court's convention judgment were not taken as binding in Ottawa it would be at Westminster. A visiting British MP said the "racing odds would be 6 to 4 that Westminster would refuse patriation if Trudeau acted without a provincial deal."<sup>75</sup> The Thatcher government warned that it could not promise parliamentary approval unless provincial assent were obtained.<sup>76</sup> In his first reaction to the judgment Trudeau had conceded the desirability of some kind of understanding with the provincial opponents. On October 23 he agreed to a conference on November 2 in Ottawa. While he and Chretien continued to insist that they would proceed on the basis of their legal authority if no agreement were reached, the pressure for accommodation was substantial.<sup>77</sup> The rest, as they say, is constitutional history. It is generally agreed that the Court's intervention was a central causative factor in the final compromise. Commenting after the Ottawa agreement, Stephen Scott

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News library, Arcnws File.

<sup>71</sup> United Press International Dispatch, October 18, 1981 (Byline, Mary Jollimore) available in LEXIS-NEXIS, News library, Arcnws File.

<sup>72</sup> *Quebec Opposes Patriation Plan*, FACTS ON FILE, World News Digest, October 9, 1981 available in LEXIS-NEXIS, News library, Arcnws File.

<sup>73</sup> United Press International Dispatch, Sept. 30, 1981 available in LEXIS-NEXIS, News library, Arcnws File.

<sup>74</sup> United Press International Dispatch, Oct. 1, 1981 (Byline Sheila Brady) available in LEXIS-NEXIS, News library, Arcnws File.

<sup>75</sup> United Press International Dispatch, Oct. 2, 1981 (Byline Sheila Brady) available in LEXIS-NEXIS, News library, Arcnws File.

<sup>76</sup> Henry Giniger, *Trudeau Making Final Bid for Accord on New Charter*, NEW YORK TIMES, Oct. 7, 1981, Section A, p. 16, col. 3. Similarly, the Court's statement that the convention in question required substantial but not unanimous provincial agreement put to rest any prospect that Westminster would balk at the absence of Quebec assent. United Press International Dispatch, Jan. 16, 1982 available in LEXIS-NEXIS, News library, Arcnws File.

<sup>77</sup> *Patriation Meeting Set*, FACTS ON FILE, World News Digest, October 30, 1981 available in LEXIS-NEXIS, News library, Arcnws File

said: "Had two Supreme Court judges switched their vote on the matter of "convention", we might have a completely different country today."<sup>78</sup>

Although its impact will be less dramatic in the short run, there is little reason to doubt that the Supreme Court's framework for a possible Quebec secession will be similarly influential in the eventual political outcome of any future referendum. That is, the Supreme Court will again be a decisive player in basic constituent decisions. Some find this prospect disquieting. Most of the objections to the Court's intervention have turned on questions of *authority*. In a powerful legal critique of the judgment Patrick Monahan questioned the Court's right to claim its decision was based on a genuine interpretation of the Constitution. The Court described its formulation of fundamental principles as necessary to fill in "gaps" in the written constitution. Monahan points out the great breadth of those principles and that there is no fixed relation of priority among them.<sup>79</sup> No "one principle", the Court said, may "trump or exclude the operation of any other".<sup>80</sup> Thus the Court retains for itself the critical, and largely undefined, role of balancing the force of the competing principles in each particular context, an activity in which the constitutional texts themselves will play little part.<sup>81</sup> According to Robin Elliott, the Court's approach treats the Constitution as an "illustrative document" rather than as a "definitive document".<sup>82</sup> Eugene Forsey voiced the same kind of criticism after the Court's judgment in the *Patriation Reference*. He worried about "suppression of the law set out in the written Constitution by judicially determined 'convention'". The critics' understanding of what the Court did in the *Secession Reference* is consistent with that of commentators more friendly to the judgment, including Mark Walters, who described it as "premised on a brand of anti-postivism according to which written and entrenched constitutions are not sovereign at all".<sup>83</sup>

Such authority-based objections to the participation of the Supreme Court in the process of constitution-making amount to a charge that the Court has assumed for itself a function to which it is not entitled according to some posited set of constitutional rules. They suppose, that is, that the destruction and reconstruction of legal systems is subject to pre-existing law. That is exactly what I have argued cannot be the case given the logical priority of the political foundation of the legal system to any constitutional rules of that system. If the Court is to be faulted therefore, it may be mainly for some kind of intentional or unintentional misrepresentation. It purported to act as the oracle of already binding law on a subject for which no such law exists.<sup>84</sup> It is reasonable, moreover,

<sup>78</sup> United Press International Dispatch, Nov. 6, 1981 available in LEXIS-NEXIS, News library, Arcnws File. See also R. ROMANOW, J. WHYTE, & H. LEESON, *supra* note 27 at 188. See also Forsey, *supra* note 21 at 38.

<sup>79</sup> See Monahan, *supra* note 13 at 77-78.

<sup>80</sup> Para. 49.

<sup>81</sup> See Monahan, *supra* note 13 at 77-78.

<sup>82</sup> See Elliott, *supra* note 19 at 95-97.

<sup>83</sup> See Walters, *supra* note 29 at 384. Walters argues, however, that the Court properly described the principles and the duty to negotiate as genuine "law." See *id.* at 389-91.

<sup>84</sup> Note this observation applies only to the court's formulation and elaboration of the "organising principles" and the "duty to negotiate". When the court says that under the constitutional law of Canada, Quebec may not secede without a

to believe that the regard for the Court's viewpoint will be a consequence of the deferential attitude of public officials and the general population *towards the commands of the law*. Warren Newman found "the sagacity—the brilliance even" of the Reference in "the Court's having had the vision to wed the value of constitutional legality with that of political legitimacy".<sup>85</sup> Had the Court not proclaimed its judgment based on principles having "full legal force",<sup>86</sup> but instead suggested the negotiation it outlined would be sensible but not "constitutionally" required, its impact might well be different.<sup>87</sup> In this respect, at least, the judgement is, indeed, as David Schneiderman described it, "a clever piece of business".<sup>88</sup>

Still, the Supreme Court cannot logically be charged with usurpation. The very law-less character of the constituent debate means that no judicial agency can logically invoke the law in favour of one result or another. In debating the essential character of the Constitution, Canadians are necessarily bereft of the comfort of accepted law. Rather, they find themselves in the situation described by a delegate to the New York Constitutional Convention of 1821. Responding to an accusation that the convention had overreached its mandate, he said "Sir, we are standing on the foundations of society. The elements of government are scattered around us."<sup>89</sup> But, on the very same grounds, no person and no collection of persons can be disqualified in this state of affairs, on legal grounds, from participating in the constituent decisions. Admittedly, the Supreme Court's intervention has no claim to be deferred to in the presumptive way of genuinely legal pronouncements. But its viewpoint may be respected based on its intrinsic persuasiveness and on the regard which people have for the wisdom and experience of the men and women who comprise the Court. Ironically, perhaps, the misimpression that the Court is the mere agent of some pre-existing law may give a useful head start to the new constitutional arrangements given the regard for legal regularity in Canadian political culture.<sup>90</sup> In a position paper on constitutional amendment published during the patriation debate, the federal

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constitutional amendment it is stating pre-existing and fairly obvious positive law.

<sup>85</sup> See NEWMAN, *supra* note 13 at 84; Whyte, *supra* note 51 at 133 ("The Court's position is that legitimacy matters, both in amending the Constitution and in winning international recognition, and as practical political matter, that legitimate conduct is the only way for secession to secede, as well as the only way for it to be successfully averted.")

<sup>86</sup> Para. 54.

<sup>87</sup> See Walters, *supra* note 29 at 390-91.

<sup>88</sup> David Schneiderman, *Introduction*, THE QUEBEC DECISION: PERSPECTIVES ON THE SUPREME COURT RULING ON SECESSION 1, 7 (D. Schneideman, ed. 1999). The Supreme Court, moreover, joins a number of other constitutional courts of last resort that have found themselves called on to evaluate the legitimacy of constitutional regimes in revolutionary situations. For a recent example see *Republic of Fiji v. Prasad*, High Court Civil Action 217/2000 (Fiji Court of Appeal, 1 March 2001). See also Richard S. Kay, *Comparative Constitutional Fundamentals*, 6 CONN. J. INT'L. L. 445 (1991).

<sup>89</sup> Quoted in RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION xii (1988).

<sup>90</sup> On the influence of the practices and values of the prior regime in legitimating a revolutionary change see Richard S. Kay, *Legal Rhetoric and Revolutionary Change*, 7 CARIB. L. REV. 161 (1997).

government accurately noted that "Canadians take pride in the fact that our Constitution, unlike those of many nations, is entirely lawful, both in its origins and its subsequent developments".<sup>91</sup> Whatever the reality, the perception of an unbroken chain of legality may have its uses. And in constitutional matters, once we have left the domain of legality, utility is the first, and perhaps the only, measure of propriety.

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<sup>91</sup> JEAN CHRETIEN, *THE ROLE OF THE UNITED KINGDOM IN THE AMENDMENT OF THE CANADIAN CONSTITUTION* 5 (1981).